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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FRANCISCO MARTINEZ DELATOBA,

on

Habeas Corpus

D054673

(San Diego County
Super. Ct. No. SCN252839)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy M. Casserly, Judge. Appeal treated as a petition for writ of habeas corpus. Petition denied.

Francisco Martinez Delatoba appeals from a judgment of the superior court arising from his plea of guilty to possession of marijuana for sale after the court denied his motion to suppress at the preliminary hearing. Delatoba contends that the law enforcement agents who executed a stop of his vehicle as he drove near the U.S. border did not have reasonable suspicion of unlawful activity, and that the evidence that agents discovered as a result of that stop should therefore have been suppressed. In the alternative, Delatoba maintains that his trial counsel rendered ineffective assistance by

failing to take the necessary procedural steps to preserve Delatoba's right to challenge on appeal the denial of his suppression motion, to which the parties had agreed as part of his plea bargain.

This court informed the parties that the court might consider the appeal as a petition for writ of habeas corpus rather than a direct appeal, and requested that the Attorney General file a response.¹

We conclude that Delatoba's counsel failed to preserve Delatoba's right to challenge the denial of his suppression motion on appeal by failing to renew the motion in the superior court. However, we treat Delatoba's appeal as a petition for writ of habeas corpus seeking relief from ineffective assistance of counsel. In addressing this issue, we must necessarily decide the merits of Delatoba's underlying contention concerning the legality of the stop. We reject Delatoba's contention that the law enforcement agents lacked reasonable suspicion to stop his car, and conclude that Delatoba thus was not prejudiced by his counsel's failure to preserve the issue for appeal. Accordingly, we deny the petition.

¹ In his briefing on appeal, Delatoba argues that his counsel rendered ineffective assistance by failing to renew the motion to suppress in the superior court. Delatoba may not raise this claim on direct appeal, since he has not obtained a certificate of probable cause. (Pen. Code, § 1237.5; *People v. Johnson* (2009) 47 Cal.4th 668, 676.) Since Delatoba may raise this claim in a petition for writ of habeas corpus, we exercise our discretion to treat this appeal as a writ petition. (See *Melinda K. v. Superior Court* (2004) 116 Cal.App.4th 1147, 1157.)

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of October 27, 2008, United States Border Patrol Agent Scott Gandre was patrolling Interstate 5 near the United States-Mexico border—a known corridor for drug smuggling—when he noticed Delatoba's car. The car had Baja California, Mexico license plates and Agent Gandre could see an air freshener hanging from the rearview mirror. According to Agent Gandre, this is a device commonly used by drug smugglers to mask the odor of drugs. Agent Gandre also observed that Delatoba's passenger was hunched over, looking into the passenger rearview mirror at a marked patrol car that was driving several car lengths behind Delatoba's vehicle. Delatoba was driving stiff-armed and straight-backed, with his body pushed back against the seat so that he was "almost hiding behind the pillar of the vehicle." Upon checking, Agent Gandre also discovered that the car had crossed the border twice that day, through two different ports of entry, and that it had crossed the border every few days over the preceding two weeks. Agent Gandre stated that this was a pattern that is consistent with drug smuggling.

Agent Chris Martinez, who was driving the marked patrol car, pulled up next to Delatoba's car. Delatoba's vehicle immediately slowed down and started to drift away from the patrol car while continuing down the freeway. At Agent Gandre's request, Agent Martinez executed a stop of Delatoba's car. The agents found another air freshener in the car's back seat and several empty energy drink containers on the floor. According to Agent Gandre, drug smugglers frequently use energy drinks to stay awake. With Delatoba's consent, the agents searched the interior of the car and found 66.2 pounds of

marijuana under the floorboard. They arrested Delatoba and his passenger and charged both with transportation of marijuana and possession of marijuana for sale.

At the preliminary hearing, Delatoba moved to suppress the drug evidence, contending in part that the Border Patrol agents did not have reasonable suspicion to pull over his car. After the court denied the motion, Delatoba pled guilty to possession of marijuana for sale. In accordance with the plea agreement, the court placed Delatoba on probation subject to various conditions. The plea agreement specified that Delatoba reserved the right to appeal the denial of his suppression motion. Delatoba now appeals that issue.

DISCUSSION

The People contend that Delatoba may not appeal from the denial of his suppression motion because he failed to renew his motion to suppress in the superior court. (Pen. Code, § 1538.5, subd. (m); *People v. Richardson* (2007) 156 Cal.App.4th 574, 582-595; *People v. Garrido* (2005) 127 Cal.App.4th 359, 364-366.) Delatoba maintains that the People are estopped from asserting this argument based on their stipulation in the trial court that Delatoba could raise this issue on appeal. However, the failure to raise the issue in the superior court is jurisdictional and precludes this court from entertaining the appeal. (*Vivid Video, Inc. v. Playboy Entertainment Group, Inc.* (2007) 147 Cal.App.4th 434, 440-441; see also *People v. Burns* (1993) 20 Cal.App.4th 1266.)

Delatoba argues in the alternative that this court should set aside his conviction and remand the matter to permit him to withdraw his guilty plea, in accordance with

People v. Burns, supra, 20 Cal.App.4th 1266. In that case, Burns pled guilty after the municipal court denied his motion to suppress evidence. The plea agreement specified that Burns would be permitted to appeal the denial of the motion. Burns challenged the denial of his motion to suppress in the Court of Appeal. (*Id.* at pp. 1269-1270, 1273.)

The *Burns* court concluded that it lacked jurisdiction to review the denial of the motion to suppress because Burns had not brought the motion in the superior court. The court noted, however, that the circumstances precluded Burns from receiving one of the benefits of his plea bargain, i.e., the right to appeal the denial of the suppression motion. For that reason, the court reversed the judgment and remanded the matter to allow Burns the opportunity to withdraw his guilty plea and to renew his suppression motion in the superior court. (*People v. Burns, supra*, 20 Cal.App.4th at pp. 1269-1270, 1274.)

While we agree with the *Burns* court that the failure to renew a suppression motion in the superior court is fatal to appellate review of the ruling on that motion, we reject its holding that such circumstances require a reversal of the judgment and its conclusion that a remand for withdrawal of the guilty plea is the proper disposition. Although the law does provide a remedy where the state breaches a plea bargain by denying the defendant the benefits of that agreement (*People v. Mancheno* (1982) 32 Cal.3d 855, 860-861; *People v. Arata* (2007) 151 Cal.App.4th 778, 781; generally *Santobello v. New York* (1971) 404 U.S. 257, 262), the state did not breach Delatoba's plea bargain in this case. Delatoba had the opportunity to renew his suppression motion in the superior court to preserve his right to raise the issue on appeal in this court, but

failed to do so. It was the failure to do so that bars him from appealing the ruling denying the motion. (See, e.g., *People v. Garrido*, *supra*, 127 Cal.App.4th at p. 364.)

Perhaps recognizing that there is a jurisdictional bar to a direct challenge to the denial of his suppression motion, Delatoba also argues that if this court concludes that it lacks jurisdiction to hear his challenge to the denial of his suppression motion, his trial counsel rendered ineffective assistance by failing to preserve the issue for appeal. To establish a violation of the constitutional right to effective assistance of counsel, a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney, and that counsel's deficient performance resulted in prejudice in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686.) In order to determine whether Delatoba's counsel's failure to preserve for appeal the denial of his suppression motion was prejudicial, we must address the legality of the stop of Delatoba's vehicle. (See *People v. Hart* (1999) 74 Cal.App.4th 479, 486-487.)

An investigatory stop does not violate a person's Fourth Amendment rights if the officer effectuating the stop had " 'reasonable suspicion' that the suspect has committed or is about to commit a crime." (*People v. Bennett* (1998) 17 Cal.4th 373, 387; *United States v. Cortez* (1981) 449 U.S. 411, 417 ["objective manifestation" that the person is, or is about to be, engaged in criminal activity].) In determining whether the officer had a reasonable suspicion, the reviewing court must look at the totality of the circumstances to determine whether the officer had a " 'particularized and objective basis' " for suspecting

legal wrongdoing, rather than a "mere 'hunch'." (*United States v. Arvizu* (2002) 534 U.S. 266, 273-274, citations omitted.)

We conclude that the Border Patrol agents had reasonable suspicion to stop Delatoba. He was driving his car, which had Mexican license plates and an air freshener hanging from the rearview mirror, along a corridor that is known for drug smuggling. Agent Gandre saw Delatoba and his passenger behaving nervously. The passenger was paying particular attention to the marked patrol car that was driving some distance behind Delatoba's car, and Delatoba's arms were stiff, and he was sitting in a manner that looked to Agent Gandre as if he was "almost hiding." Agent Gandre also discovered that Delatoba's car had crossed the border twice that day, through two different ports of entry, and that the car had crossed the border every few days over the preceding two weeks—a pattern that, according to Agent Gandre, was consistent with drug smuggling. Finally, when the marked patrol car pulled beside Delatoba's car, Delatoba slowed down significantly and started to drift in a direction away from the patrol car.

These facts are sufficient to support a reasonable suspicion that Delatoba was involved in drug smuggling, thus justifying the agents' stop of his car. (See *People v. Souza* (1994) 9 Cal.4th 224, 231 [officer must be able to point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity]; compare *People v. Bower* (1979) 24 Cal.3d 638, 645 [officers' observation of one white male and several black males leaving a housing project populated by blacks at night not sufficient to establish reasonable suspicion that the males were involved in a crime]; *People v.*

Glover (1979) 93 Cal.App.3d 376, 381-382 [officers' detention of driver after setting up a roadblock to stop all vehicles on that particular road in an attempt to catch the perpetrator of a robbery at a nearby rural motel not supported by reasonable suspicion in the absence of detailed evidence as to the remoteness of the area, the sparseness of its population and the normal amount of vehicular traffic on that road at night in midwinter].) Because the stop was valid, Delatoba's counsel's failure to preserve the issue for appellate review was not prejudicial.

DISPOSITION

The petition for writ of habeas corpus is denied. The decision is immediately final in this court. (Cal. Rules of Court, rule 8.387(b)2(A).)

AARON, J.

WE CONCUR:

HUFFMAN, Acting P.J.

IRION, J.